spondents' erroneous assertion (Bobrick Opp. 18-19) that the record is devoid of economic evidence analyzing or demonstrating market impact, the record contains an extensive market study (C.A. App. 11612-49) and market share data provided by respondents' supplier Formica (*id.* at 11656). By holding petitioner's evidence of respondents' actions in restraint of trade through false disparagements of petitioner's products to be irrelevant, the Third Circuit applied a legal rule that no amount of evidence could overcome. If that rule is overturned by this Court, as it should be, petitioner has more than satisfied its non-movant burden on summary judgment that if material disputes of fact exist the non-movant is entitled to a trial on the merits.

7. Finally, respondents argue (Bobrick Opp. 26-27) that the Third Circuit's approach below did not contravene the anti-"compartmentalization" rule of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), when it refused to evaluate the antitrust legality of the campaign of intentionally false disparagement as one element of an exclusionary conspiracy employing that and additional forms of exclusionary conduct. Contrary to *Continental Ore*, the court below "wiped the slate clean" after considering the false statements.[12] That was reversible error.[13] All that respondents can point to

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(§ 2, using factor), *with Travel Arrangers*, 623 F.2d 1255 (§ 1 and § 2, not using factor). The D.C. Circuit found Microsoft's deception exclusionary in violation of § 2 without considering the cost or difficulty of counteracting Microsoft's falsehoods. In any event, petitioner's summary judgment record in the present § 1 restraint of trade case satisfies even the *Ayerst* court's requirements for a monopolization case.

[12] *Compare Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1522 n.18 (10th Cir. 1984) ("Plaintiff's evidence should be viewed as a whole. Each of the 'six things' viewed in isolation need not be supported by sufficient evidence to amount to a § 2 violation. It is enough [under *Continental Ore*] that taken together they are sufficient to prove the monopolization claim."), *aff'd*, 472 U.S. 585 (1985).

[13] Respondents Hornyak and Vogel separately question the appropriateness of their being liable as co-conspirators, an issue that the

is the Third Circuit's analysis of the additional elements individually in isolation from the false statement campaign. In fact, it would have been impossible for the Third Circuit to have evaluated the false statements in light of the aggregate, cumulative weight of the other exclusionary acts, because the court below held the false statements to be "irrelevant" and "of no consequence" to its antitrust analysis (Pet. App. 14a).

Third Circuit declined to address (Pet. App. 12a-13a n.14). While that issue is not before this Court, courts nonetheless recognize that independent-contractor agents may be held liable for conspiring with their principals, and that each conspirator is liable for the acts of the other conspirators. *See, e.g., Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 57 n.4 (1st Cir. 2002); *Greenville Publ'g Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (4th Cir. 1974). *See also Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946) (co-conspirator criminal liability); *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 26 (6th Cir. 1903) (civil antitrust liability), *aff'd*, 203 U.S. 390 (1906).

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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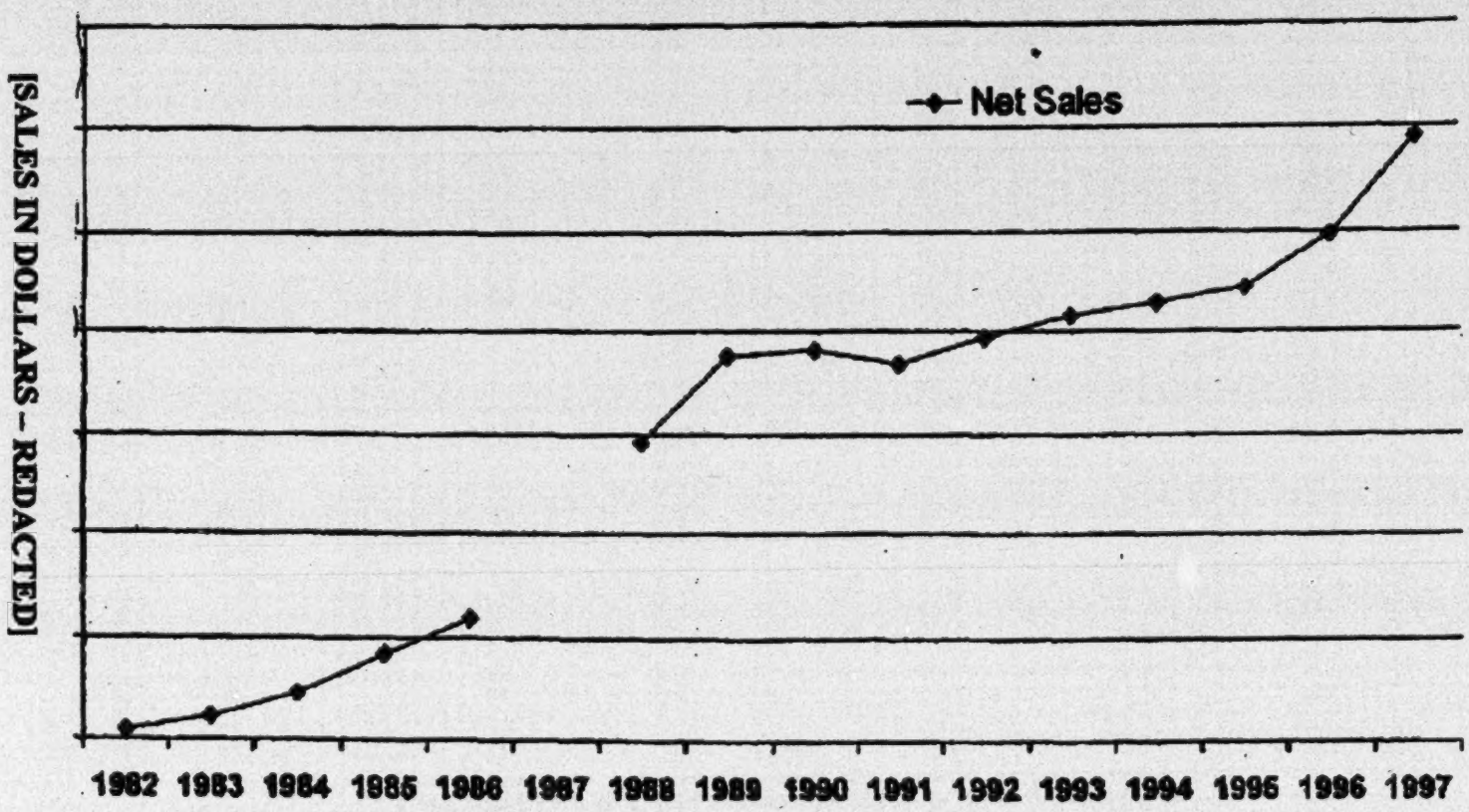
APPENDIX

SUMMARY OF SANTANA'S NET SALES [OF HDPE PARTITIONS]



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